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Supreme Court, U.S.
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No. 93-1929

In the Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS VENEZIA, PETITIONER

v.

BONDS ROBINSON, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this case was properly dismissed because petitioner has never served a summons on respondent.

2. Whether petitioner was entitled to discovery on the question of whether respondent properly removed the case under 28 U.S.C. 1442(a)(1).

3. Whether, under Illinois law, petitioner gave respondent adequate previous notice of his preliminary injunction request and the state court gave respondent adequate procedural rights at the preliminary injunction hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 16 F.3d 209. The opinions of the district court (Pet. App. A7-A15; App., *infra*, 1a-3a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1994. A petition for rehearing was denied on March 2, 1994. Pet. App. A16. The petition for a writ of certiorari was filed on May 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a vending machine operator, installed and operated video poker machines at a V.F.W. hall on Scott Air Force Base in Illinois. Respondent, an officer of the Illinois Liquor Control Commission, suspected that those machines were being used to pay off players in cash or liquor, in violation of Illinois law. In May, 1992, state agents seized three of petitioner's machines; in August, 1992, they seized another four of his machines. Petitioner alleges that before each seizure, respondent asked for a bribe in exchange for halting the imminent seizure. Petitioner says he agreed to pay the bribes in order to entrap respondent but that he did not actually pay them. Pet. App. A1-A2, A8-A9.

After the August, 1992, seizure, petitioner filed a petition in Illinois state court seeking a preliminary and permanent injunction against respondent. The requested injunctive relief would prohibit respondent from continuing to threaten or coerce him or extort bribes from him. Pet. App. A2, A7-A8. Petitioner did not give respondent prior notice of his petition. Instead, he merely served a subpoena on respondent demanding respondent's testimony. Petitioner concedes (Pet. 3, 21) that the subpoena was a "pretext" to get respondent to the courthouse. The subpoena was served on respondent fifteen to twenty minutes before the preliminary injunction hearing began on September 1, 1992. Pet. App. A2; see also 9/1/92 Hearing Tr. (Tr.) 4, C.A. App. A23. On its face, the subpoena does not reveal anything about the nature of the proceeding at which respondent was supposedly required to testify. Pet. App. A13; C.A. App. A18.

At the start of the hearing, petitioner called respondent to testify and began questioning him about

his investigation of petitioner. While respondent was on the witness stand, petitioner handed him a copy of the petition for injunctive relief. Petitioner did not stop questioning respondent in order to allow him to read the petition. Pet. App. A7-A8, A13; Tr. 6, C.A. App. A25. Petitioner has never served a summons on respondent in support of the petition, and the record shows no return of service. Pet. App. A10.

The state court denied respondent's request, made from the witness stand, to be allowed to obtain counsel. Pet. App. A7; Tr. 4-5, 22, C.A. App. A23-A24, A41. The court also refused to recess the hearing to let respondent make a telephone call. Pet. App. A8; Tr. 7, C.A. App. A26. In response to petitioner's questioning, respondent testified that he was "assigned to" the local office of the Federal Bureau of Investigation (FBI) at that time (Tr. 5-6, C.A. App. A24-A25), and that the FBI was involved in his investigation of petitioner (Tr. 10, 16, 23, 27, C.A. App. A29, A35, A42, A46). Respondent also gave some details of his discussions with petitioner and petitioner's employees about a plan to pay respondent $250 per week in bribes. But the court gave respondent no opportunity to present any affirmative testimony or evidence or any argument in his defense. Rather, the court told respondent to step down when petitioner had finished his direct examination of respondent. Tr. 29, C.A. App. A48. Immediately after the close of petitioner's case, the court granted the injunction. Tr. 49-50, C.A. App. A68-A69. The one-paragraph order, styled as a preliminary injunction, enjoined respondent "from threatening or coercing" petitioner or his employees, "from soliciting bribes or acts of extortion," and "from unlawfully interfering with" petitioner's businesses and "unlawfully seizing the property of" petitioner or his businesses. Pet. App. A9; C.A. App. A72.

On October 29, 1992, petitioner filed a petition for a rule to show cause, alleging that respondent had violated the injunction by demanding that two of petitioner's customers remove petitioner's vending machines. C.A. App. A73-A75.

2. On November 23, 1992, the United States Attorney filed a notice removing the case to the United States District Court for the Southern District of Illinois. C.A. App. A76-A78. The removal notice was based on 28 U.S.C. 1442(a)(1), which allows removal of an action brought against an "officer of the United States," or a "person acting under him," for any act "under color of such office" or under the authority of a criminal law enforcement statute. C.A. App. A77-A78. The notice stated that respondent "was engaged in an authorized and proper criminal investigation on behalf of the [FBI]," and that his "actions were necessary and proper to the performance of his duties" and thus "raise a colorable defense to the cause of action." *Id.* at A78. Those statements were supported by accompanying affidavits from respondent and two FBI special agents. *Id.* at A120-A125. The affidavits said that respondent was working under the direction and control of the FBI during the investigation of petitioner, including at the time of his August, 1992, bribery discussions and his October, 1992, actions in regard to two of petitioner's customers. *Ibid.*; see Pet. App. A3.

Petitioner moved to remand. In his motion, he asserted that he believed that respondent "was not acting in the capacity as a federal agent or officer at all times relevant to the facts and events which gave rise to this cause of

action," and he asked for discovery on that assertion. C.A. App. A102.[1]

On April 2, 1993, the district court denied the motion to remand. App., *infra*, 1a-3a. It reasoned that the FBI affidavits "reveal that during the time period set forth in the preliminary injunction motion, [respondent] was working under their direction in an ongoing criminal investigation * * *. It is not a requirement of jurisdiction under § 1442(a)(1) that all of the [respondent]'s activities be related to his federal duties." App., *infra*, 2a (citing *Lepucki* v. *Van Wormer*, 765 F.2d 86, 88-89 (7th Cir.), cert. denied, 474 U.S. 827 (1985). The court thus held that "[s]ubsequent discovery is irrelevant, and will not affect the Court's jurisdiction." App., *infra*, 2a.

On May 18, 1993, the district court dissolved the preliminary injunction and dismissed the action. Pet. App. A7-A15. It observed that Illinois law requires detailed findings to support a preliminary injunction, *id.* at A10 (citing *Hough* v. *Weber*, 560 N.E.2d 5, 13 (Ill. App. Ct.), leave to appeal denied, 564 N.E.2d 837 (Ill. 1990)), and that even more detailed findings are required to enjoin an ongoing federal criminal investigation, Pet. App. A11 (citing *Reporters Comm. for Freedom of the Press* v. *American Tel. & Tel. Co.*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979)). It criticized the state court for "ma[king] no specific findings as to any of the elements necessary to support a claim for injunctive relief," but relying instead on "general, boilerplate findings." Pet. App. A12. Moreover, the court held that respondent did not get "previous notice of the time and

[1] Petitioner argues (Pet. 3, 5) that the removal notice was untimely, but he does not challenge the court of appeals' conclusion (Pet. App. A4) that he waived that argument by failing to raise it in his motion to remand.

place of the applications" for the preliminary injunction, as required by Illinois law, Ill. Ann. Stat. ch. 735, para. 5/11-102 (Smith-Hurd 1992). Pet. App. A13. The court reasoned that the subpoena to respondent did not provide adequate "previous notice" because it was given to him only fifteen minutes prior to the hearing and "was silent as to the nature of the hearing"; the petition itself did not provide adequate "previous notice," since it was given to him while he was on the witness stand and he was not even given time to read it. *Id.* at A13. The district court thus dissolved the preliminary injunction. *Id.* at A15.

Next, the district court granted respondent's motion to dismiss the action. It observed that under Illinois Supreme Court Rules 101 and 102(d), the plaintiff must serve a summons on a defendant unless there is waiver of service of process or a general appearance. Pet. App. A13-A14. Here, the court explained, petitioner never served a summons on respondent or obtained return on service, and respondent's "forced appearance and testimony at the September 1st hearing [pursuant to a subpoena to testify] did not constitute a waiver of service, nor can it be said that his appearance constituted a general appearance." *Id.* at A14.

3. The court of appeals affirmed. Pet. App. A1-A6. It described the state court hearing as a "parody of legal procedure." *Id.* at A2. That hearing "violated so many rules of Illinois law—not to mention the due process clause of the fourteenth amendment—that it is not worth reciting them." *Id.* at A2-A3. The court noted that it had referred the case to the Judicial Inquiry Board of Illinois. *Id.* at A3 n.†.

The court of appeals next held that petitioner had not properly served respondent. It reasoned that "[a] subpoena is not a summons, and * * * handing the

defendant a copy of the complaint in open court * * * does not satisfy either state or federal requirements of service." Pet. App. A4. The court concluded that the failure of service, standing alone, "forecloses every avenue of attacking th[e] [district court's] judgment." *Id.* at A6.

As to the propriety of the removal, the court of appeals noted that "[a] federal defendant need not show that he is entitled to *prevail* in order to have access to the federal forum," only that "he *is* a federal official or is 'acting under' such an official." Pet. App. A5-A6. The court recognized that a plaintiff might be entitled to discovery to contest a defendant's assertion that he is a federal officer or acting under one. *Id.* at A6. This plaintiff was not entitled to it, however, because a plaintiff is allowed discovery "only after the defendant has been served with process." *Ibid.* (citing Fed. R. Civ. P. 33(a) and 34(b)). Since respondent "remains unserved," the court concluded, "[t]he district court was entitled to accept the affidavits at face value" and thus give respondent a federal forum. Pet. App. A6.

The court of appeals subsequently denied rehearing, with no judge voting for rehearing en banc. Pet. App. A16.

ARGUMENT

Petitioner seeks to raise a host of issues in challenging the decision below. Pet. i. None of them merits further review, however, because petitioner has never served a summons on respondent. That basic failure, standing alone, justified dismissal of this action, as the court of appeals held. Pet. App. A6. Petitioner's challenge to the other rulings by the courts below is also without merit.

1. The district court made three distinct rulings in two separate orders. In its first order, it denied petitioner's motion to remand the case to the state court and his request for discovery in support of that motion. App., *infra*, 1a-3a. In its second order, it dissolved the preliminary injunction and dismissed the action. Pet. App. A7-A15. The district court based only its third ruling—dismissing the action—upon petitioner's failure to serve a summons on respondent. As the court of appeals recognized, however, the failure of service was sufficient, standing alone, to justify all of the district court's rulings. See *id.* at A4-A6.

There is no merit to petitioner's challenge to the court of appeals' holding that this case fails for lack of service. As an initial matter, petitioner errs when he accuses the courts below of holding that before a defendant can be bound by a preliminary injunction, "he must first be served with a summons and complaint." Pet. 11; see also Pet. 9-11. That is not what either court below held. They held that, for an action to proceed to final judgment, a plaintiff must eventually effect proper service. Pet. App. A4, A13-A14. That holding is compelled under Illinois Supreme Court Rules 101 and 102(d), and those rules merely reflect well-established principles. A preliminary injunction is designed only to preserve the status quo pending the final disposition of the case. Even assuming that a preliminary injunction can be entered without service of a summons, unless service is eventually effected, the complaint must be dismissed and the preliminary injunction then becomes moot. Cf. *Cypress Barn, Inc.* v. *Western Elec. Co.*, 812 F.2d 1363 (11th Cir. 1987).

Petitioner has made no effort to excuse his failure to serve a summons on respondent, as the district court observed. See Pet. App. A14-A15. And as the court of

appeals held, "[a] subpoena is not a summons, and * * * handing the defendant a copy of the complaint in open court * * * does not satisfy either state or federal requirements of service." *Id.* at A4. To this date, petitioner has still not attempted to serve respondent, even after removal. See 28 U.S.C. 1448. Nor has he shown "good cause" for failing to serve within 120 days of the filing of the complaint. See Fed. R. Civ. P. 4(m) (applicable after removal under Fed. R. Civ. P. 81(c)). Nor has he attempted to argue that respondent waived service or made a general appearance sufficient to satisfy the service requirements under either Illinois or federal civil procedure. Such an argument would be doomed in any event, since respondent's only appearance in state court was at the hearing to which he was drawn by "pretext," and his only federal court appearances have been to remove and to move to dismiss for failure to serve (and to defend petitioner's objections to these actions). See Pet. App. A14.

2. In its first order, the district court denied petitioner's request for discovery on his motion to remand the case, holding that he had not identified any factual dispute that, if resolved in his favor, would have defeated removal jurisdiction. App., *infra*, 1a-3a. Since no summons had ever been served on respondent, the court of appeals correctly found it unnecessary to address that holding on the merits. See pp. 6-7, *supra*. In any event, the district court was correct in refusing to allow discovery on the propriety of removal.

Petitioner's challenge to the district court's ruling is based on a faulty premise: that to remove the case under 28 U.S.C. 1442(a)(1), respondent had to show that *all* of his actions relevant to the complaint were taken in the course of his federal duties. See Pet. 7. To the contrary, Section 1442(a)(1) allows removal of an action as long as

at least *some* of the relevant conduct of the defendant was carried out in a federal capacity. See *Lepucki* v. *Van Wormer*, 765 F.2d 86, 88-89 (7th Cir.), cert. denied, 474 U.S. 827 (1985). Thus, to uphold removal and defeat the motion to remand, respondent needed only to show that, at some of the relevant times and as to some of the relevant actions, he was acting in a federal capacity.

It is undisputed that respondent made that showing. Petitioner concedes that, as of August, 1992, respondent was working for the Federal Bureau of Investigation. Pet. 7. Thus, respondent was acting under federal direction and control in August, September, and October of 1992. That was when most of the events on which this action was based occurred, including respondent's August discussions with petitioner concerning the possible bribe, his August seizure of four of petitioner's machines, the September 1 state court injunction hearing, and his October contacts with two of petitioner's customers. Petitioner has asserted that respondent was not working under federal direction in April, 1992, when he first met petitioner and the first seizure occurred. See Pet. 6-7. As discussed above, however, that assertion is irrelevant to the propriety of removal. Consequently, petitioner was not entitled to discovery to support that assertion in connection with his motion to remand the case as improperly removed.[2]

[2] For the same reason, the courts below correctly denied petitioner's motion to supplement the record on appeal with transcripts from another case in which respondent allegedly conceded that he began to work for the FBI later than in April, 1992. See Pet. App. A32-A34, A44. The alleged concession was irrelevant to the propriety of removal. Moreover, the district court was correct in holding that petitioner was not entitled to have the transcripts added to the record under Fed. R. App. P. 10(e). That Rule permits modification of the record after

3. In its second order, the district court dissolved the preliminary injunction and dismissed the action. Pet. App. A7-A15. Both rulings were correct.

a. The district court dissolved the preliminary injunction on the ground that respondent and the state court failed to follow Illinois law in applying for and granting the injunction. Pet. App. A12-A13. The court of appeals agreed, calling the state hearing a "parody of legal procedure" and referring the case to the Judicial Inquiry Board of Illinois. *Id.* at A2-A3 & n†. Petitioner claims that those rulings constitute excessive federal interference with state law matters. Pet. 9-12. To the contrary, they merely apply the text of the Illinois statute and basic precepts of due process.

The Illinois statute provides:

> No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party.

Ill. Ann. Stat. ch. 735, para. 5/11-102 (Smith-Hurd 1992). Petitioner argues that Illinois case law allows the "previous notice" to be informal. Pet. 9. But the same case law holds that, however informal the notice, it must be given in advance of the hearing. See *Board of Educ.* v. *Parlor*, 424 N.E.2d 1152 (Ill. 1981). That did not occur

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initiation of the appeal only if the omission was "by error or accident" or something is "misstated;" modification is not permissible "to create a new record, or somehow change the record and the facts which were before the district court at the time it ruled." Pet. App. A33-A34. The transcripts petitioner sought to add to the record and the newspaper editorial (*id.* at A35-A42) could not have been omitted by accident "because they did not exist at the time the appeal was taken," but only were created after the appeal was pending. *Id.* at A33.

here. The only advance notice of the hearing was a subpoena served on respondent fifteen to twenty minutes before the hearing, which on its face only sought his testimony in a proceeding the purpose of which was not identified. Pet. App. A2, A13; Tr. 4, C.A. App. A23; see also C.A. App. A18 (text of subpoena). Petitioner admits that this subpoena was a "pretext" to draw respondent into the courtroom, where he could then be present for the preliminary injunction hearing. Pet. 3, 21.[3] Respondent was handed the petition for injunctive relief on the witness stand, in the midst of his compelled testimony, and he did not even have a chance to read the petition before his examination by petitioner's counsel continued. Pet. App. A7-A8, A13; Tr. 6, C.A. App. A25. This calculated effort to draw respondent into a trap cannot constitute "previous notice" of the hearing for purposes of the Illinois statute.

Moreover, these actions, as well as others by the state court, denied respondent due process of law. The state court denied respondent's request to be able to obtain counsel, or even to make a telephone call; it gave him no opportunity to present affirmative testimony of his own or from other witnesses or to cross-examine petitioner's two other witnesses; and it did not permit him to present any argument at the close of petitioner's case. The state court awarded the preliminary injunction without making any specific findings. Moreover, the injunction failed to specify the acts enjoined. See Pet. App. A9. The

[3] Petitioner alleges that the plan to call respondent to the courthouse was a joint decision by his counsel and the local State's Attorney (Pet. 3, 21). Although that allegation concerns matters outside the record, we note that we have brought the allegation to the attention of the State's Attorney, and he has furnished us with an affidavit stating that it is false.

federal district court and the court of appeals did not overstep their role in a removed case when, based on state law and constitutional principles of due process, they dissolved this injunction and referred the case to a state body for possible discipline against the judge.

b. The district court dismissed the action because petitioner failed to serve a summons on respondent. Pet. App. A13-A14. That disposition was correct for reasons discussed above in Point 1. See pp. 7-9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1994

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THOMAS VENEZIA, PLAINTIFF-PETITIONER

v.

BONDS ROBINSON, JR., DEFENDANT-RESPONDENT

Cause No. 92-CV-867-WDS

[Filed Apr. 2, 1993]

MEMORANDUM AND ORDER

STIEHL, Chief Judge:

Before the Court is plaintiff's motion to remand. This action was removed from the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois, pursuant to 28 U.S.C. § 1442(a)(1). Prior to its removal, the Circuit Court had issued a preliminary injunction enjoining and restraining the defendant from threatening or coercing plaintiff, soliciting bribes, interfering with plaintiff's business, or seizing any property of plaintiff or his businesses, Ace Music or B&H Vending. Plaintiff filed a petition

for rule to show cause in the state court action, and the United States filed then [*sic*] removed the case to this Court. The removal alleges that at all times relevant, defendant was an officer of the United States, or a person acting under him, and acting under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals. 28 U.S.C. § 1442(a)(1). The government asserts that the defendant was engaged in and acting on behalf of an authorized and proper criminal investigation on behalf of the Federal Bureau of Investigation.

In his motion to remand, plaintiff asserts that he believes that defendant was not acting as a federal agent or officer at all times relevant, and that plaintiff has propounded discovery requests on defendant to that effect. Plaintiff prays that the Court remand the action after "sufficient discovery" has been completed.

This Court has jurisdiction over actions which involve an officer or agent of the United States under 28 U.S.C. § 1442. The affidavits of FBI Special Agent Larry Skora and FBI Supervisory Special Agent Reginald J. Joseph reveal that during the time period set forth in the preliminary injunction motion, defendant was working under their direction in an ongoing criminal investigation in the Southern District of Illinois. It is not a requirement of jurisdiction under § 1442(a)(1) that all of the defendant's activities be related to his federal duties. *See Lepucki v. Van Wormer*, 765 F.2d 86, 88-89 (7th Cir.), cert. denied, 474 U.S. 827 (1985).

Subsequent discovery is irrelevant, and will not affect the Court's jurisdiction. This action was properly removed, and this Court has jurisdiction

over this action. Accordingly, plaintiff's motion to remand is DENIED.

IT IS SO ORDERED.

Dated: 2 April 1993

/s/ William D. Stiehl
CHIEF JUDGE